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No. 03-853

IN THE

Supreme Court of the United States

TOMMY G. THOMPSON,
SECRETARY OF HEALTH AND HUMAN SERVICES,
Petitioner,

v.

CHEROKEE NATION OF OKLAHOMA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

MEMORANDUM IN RESPONSE TO PETITION

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QUESTIONS PRESENTED

The Indian Self-Determination and Education Assistance Act ("ISDA"), 25 U.S.C. §§ 450-450n, 458-458bbb-2, directs the Secretary of Health and Human Services to pay Indian tribal contractors operating federal hospitals or clinics the necessary "contract support costs" required to administer those contracts, and establishes a damages remedy under the Contract Disputes Act for any contract breach. The ISDA provides further that the Secretary's contract payments are "subject to the availability of appropriations" and that "the Secretary is not required to reduce programs, projects, or activities serving [any other] tribe," 25 U.S.C. § 450j-1(b). But, in order to curb an agency practice of regularly underfunding such contracts, the ISDA also instructs three times that the contract amount "shall not be reduced" by the Secretary to pay for various "Federal functions." *Id.* The questions presented are:

1. Whether, when the Secretary received from Congress an increased, multibillion dollar appropriation "to carry out the . . . [ISDA]" in an amount sufficient to pay an ISDA contractor its contract support costs, the Secretary's underpayment to the contractor was excused by his decision to fund other activities instead, including the very "Federal functions" Congress prohibited him from funding at the expense of his ISDA contract obligations.

2. Whether the Secretary's admission that tens of millions of dollars in appropriated funds either went unspent or were spent for agency purposes other than "programs, projects, or activities serving a tribe" eliminated any genuine issue of material fact regarding his ability to pay the contractor in full without reducing funding for such other tribal programs.

3. Whether an appropriations rider passed in 1998 could retroactively alter the effect of three unambiguous prior appropriations Acts so as to cut off vested contract rights.

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OPINIONS BELOW

In addition to the opinions identified by the United States in its petition, there is an additional opinion by the Interior Board of Contract Appeals available at 01-1 B.C.A. (CCH) ¶ 31,158 (Oct. 31, 2000), granting the Secretary's motion for reconsideration in advance of the Board's eventual reaffirmance of its earlier opinion (Pet. App. 43a).

ARGUMENT

This case involves the enforceablity of government contracts entered into under the Indian Self-Determination and Education Assistance Act, as amended ("ISDA" or "Act"), 25 U.S.C. §§ 450-450n, 458-458bbb-2. It is a reverse image to the Tenth Circuit's contrary decision in *Cherokee Nation and*

Shoshone-Paiute Tribes v. Thompson, 311 F.3d 1054 (10th Cir. 2002), petition for cert. pending, No. 02-1472 (filed Apr. 3, 2003) ("*Cherokee I*").

Here, the Federal Circuit applied "fundamental principles of appropriations law" (Pet. App. 12a) to conclude that respondent Cherokee Nation was entitled to damages for the Secretary's failure to pay the amounts specified in three contracts entered into under that Act. The Federal Circuit held the Secretary not excused by any lack of "available" appropriations from paying the contracts in full, because in each instance Congress appropriated to the Secretary a multi-billion dollar appropriation to carry out the ISDA, without either capping the amounts the Secretary could lawfully pay respondent to meet his contract obligations, or limiting in any manner the Secretary's authority to shift funds internally if necessary to meet those obligations. Any perceived insufficiency in available funding was thus of the Secretary's own making. Pet. App. 17a-25a.

The Federal Circuit further held the Secretary not excused from using a small fraction of each appropriation to pay in full his contract obligations to the respondent by any need to preserve his funding for "programs, projects, or activities serving a tribe" (as 25 U.S.C. § 450j-1(b) might otherwise permit), because the Secretary admitted his expenditures included tens of millions of dollars *not* spent on programs serving other tribes. *Id.* 31a-34a. Finally, the Federal Circuit held that an appropriations act rider enacted years after the contracts were executed could not—and, given the ambiguous statutory terms, did not—alter the government's pre-existing contract obligations. *Id.* 26a-31a, interpreting Pub. L. No. 105-277, § 314, 112 Stat. 2681-288 (1998) ("Section 314").

In a careful and scholarly opinion, the Federal Circuit rejected the contrary conclusions reached by the Tenth Circuit in *Cherokee I* (involving a fourth Cherokee contract, two Shoshone-Paiute contracts, and the same appropriations act

language). Indeed, in this case the Federal Circuit convincingly rejected the Tenth Circuit's reasoning in *Cherokee I* on virtually all controlling points. The complete conflict between the opinions of the two courts is self-evident in their treatment of the issues. *See Cherokee I*, Supp. Br. in Supp. of Pet. 2-6. Respondent therefore agrees that review of these issues in this Court is warranted, and respectfully suggests that the Court consolidate the two petitions for briefing and argument.

Notwithstanding this agreement, Rule 15.2 places on respondent an "obligation" to "address any perceived misstatement of fact or law in the petition that bears on what issues properly would be before the Court if certiorari were granted." Here, the government has grossly misstated the procedural posture of the two cases, the nature of the contractual relationship between the parties, and the consequences of the ruling below for the Secretary. In the balance of this memorandum we address the Secretary's misstatements.

1. One of the most curious—and revealing—aspects of the government's petition is the Secretary's argument that, in the event the Court elects not to consolidate the two cases, the Court should review not the case the Secretary lost—*this* case—but the case he won (*Cherokee I*). To support this odd proposition, the government argues that, in supposed contrast to the case at bar, "the decision in *Cherokee I* has the benefit of a full record compiled in [the] trial court, as well as concurrent findings of fact by the district court and court of appeals." Pet. 28. That is simply not so. Indeed, it is, if anything, the Federal Circuit case whose record is the more complete—including not only materially identical affidavits to those offered by the Secretary in *Cherokee I*, but also the Secretary's express concessions on his key "reduction clause" defense.

To be clear, that portion of the record the Secretary relied upon in *Cherokee I* is materially *identical* to the record the Secretary submitted to the Federal Circuit here. This is so because the Secretary, in successfully seeking reconsideration before the Interior Board of Contract Appeals, submitted an additional detailed affidavit with attachments—a new affidavit beyond the two initially offered—that was materially *identical* to the same affiant's declaration submitted to the district court in the *Cherokee I* litigation. Compare 2 C.A. App. 473 with *Cherokee I*, 2 C.A. App. 527. The Secretary is simply wrong when asserting that the *Cherokee i* record is any more complete than the record here.[1]

But far more important to the issue at hand is the Secretary's central misrepresentation in *Cherokee I*, a misrepresentation which, because it went unquestioned by the court, lies at the heart of the Tenth Circuit's error in that case. As the government here reminds the Court, the trial and appellate courts in *Cherokee I* "did not question" the Secretary's representation that to have paid anything more to any ISDA contractor would have compelled the Secretary to reduce other tribal services. Pet. 24.[2] Here, in contrast, the record shows that when confronted by a more skeptical court and asked to explain himself, the Secretary was forced to "admit[ ]" that, contrary to the misrepresentation made in *Cherokee I*, the Secretary *could* have paid the Cherokee

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[1] Contrary to the government's statement (Pet. 12), the Board (acting through a second panel) *granted* the government's reconsideration motion and gave it another 'bite at the apple.' *Supra* at 1. But because the Secretary's proof never established even a questionable issue that paying the respondent would have required reductions in ongoing programs serving other tribes, yet a third Board panel ultimately reaffirmed the original panel's liability ruling against the Secretary. Pet. App. 47a.

[2] Contrary to the government's suggestion (Pet. 29), the *Cherokee I* petitioners timely and repeatedly invoked 25 U.S.C. § 450j-1(b)(1)-(4) to defeat the Secretary's "reduction clause" defense. *Cherokee I*, C.A. Appellants' Opening Brief at 11, 28, 42, 55.

Nation in full, not by redirecting monies spent on other "programs serving tribes," but by using some of the tens of millions of dollars "he retained" each year for the agency's own "federal functions" (Pet. App. 32a)—and even millions he admitted had not been spent on anything. *Id.* 33a.[3] (Recall that the ISDA three times *prohibits* the Secretary from spending on his own "Federal functions" at the expense of meeting his contract obligations to contractors like the respondent. 25 U.S.C. § 450j-1(b)(1), (3), (4).) It is these dispositive factual admissions here, and not some non-existent superior record in *Cherokee I*, that explain why the Secretary seems to run away from the very case he has petitioned this Court to review.

2. The government also appears to suggest that *Cherokee I* is the better case for the Court to examine because the Tenth Circuit got it right and the Federal Circuit got it wrong. Without dwelling too much on the merits (which are fully and correctly addressed in the Federal Circuit's opinion), the government's ancillary arguments in support of that proposition must fail.

For instance, the Secretary's central and repeated new refrain—that the relationship between the Secretary and a tribal contractor does not really involve a "contract" at all, but instead some more nebulous "governmental funding arrangements" of a lesser stature and, of course, a lesser enforceability (*e.g.*, Pet. 17), indeed, that these so-called "funding arrangements" do not impose any "payment obligation[s] to begin with" (*id.* 19) —is manifestly contrary to the Act. It is no mere accident that the ISDA in nearly every sentence—426 times, to be exact—employs the term "contract" to describe the relationship between the government and an

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[3] Contrary to the government's statement (Pet. 28), this was not "appellate factfinding" but a party admission, plain and simple—and one the Secretary does not contest here.

Indian Tribe operating a federal facility under the Act. 25 U.S.C. §§ 450-450n. The Senate Indian Affairs Committee explained in unmistakable language that the term "contract" was chosen "to convey the sense of a legally binding instrument" with "legal consequences" upon the breach of "contractual obligations." S. Rep. No. 100-274 (1987), at 19 (expressly rejecting the term "intergovernmental agreement"). Of course, the whole point of adopting a "legally binding instrument" was to trigger the very damages remedies the respondent invoked here under the Contract Disputes Act, 41 U.S.C. §§ 601-613. S. Rep. 100-274, at 19 (the term "'contract' is consistent with the provision [in 25 U.S.C. § 450m-1(d)] which authorizes the application of the Contract Disputes Act to self-determination contracts"). With "contracts" enforceable under the Contract Disputes Act, tribal contractors would now have "viable remedies," "particularly in the area of funding indirect costs," because *prior* law "afford[ed] such contractors no effective remedy for redressing such violations." *Id.* at 37. These contracts are hardly mere "funding arrangements."[4]

Similarly, the notion that somehow the exemption of ISDA contracts after 1988 from the general federal procurement laws makes ISDA contracts less "contracts" (Pet. 17) both is unsupportable and ignores the purpose of the exemption. Far from weakening contractors' rights, the point of the exemption was "to decrease the volume of contract compliance and reporting requirements associated with tribal contracts, and to decrease the volume of unnecessary contract monitoring requirements on the Federal agencies," so that "the federal

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[4] *See also* S. Rep. 100-274, at 36 ("Section [450m-1] subjects self-determination contracts to the Contract Disputes Act, thereby affording self-determination contractors the procedural protections now given other federal contractors by that Act. * * * This amendment also provides to self-determination contractors the same favorable treatment as to interest on amounts in dispute which is now given to other federal contractors.")

contract monitoring bureaucracy that has replaced the federal service bureaucracy will be greatly reduced." S. Rep. 100-274, at 19. As the Federal Circuit correctly observed in rejecting the government's suggestion (Pet. App. 17a, n. 5):

> There is nothing in the ISDA to support the contention that the Secretary has wider latitude to breach his contracts with the Indian tribes than he has with other government contractors.

Nor is there anything to the government's new apocalyptic vision of the Indian Health Service now ceasing to exist (Pet. 25) because the Federal Circuit decision will cause untold "significant ongoing programmatic consequences" (*id.* 27), "impair the agency's operation" and even "prevent administration of the ISDA itself" (*id.* 28). To be clear, insofar as the IHS is concerned this case will have absolutely *no* present day fiscal impact whatsoever. This is so because (as the government's Petition itself acknowledges) "[s]ince fiscal year 1998, Congress has regularly included express caps on funding for contract support costs in the annual appropriations legislation" and "[t]here is no disagreement [among the circuits] that such express caps render [agency] payments beyond the amounts specified 'unavailable' within the meaning of the ISDA." *Id.* 27.[5] Because of those caps IHS

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[5] The current controversy does not involve the government's potential liability under an ISDA contract in later years when the Secretary's appropriations to pay those contracts were capped at an insufficient "not to exceed" amount. Whether in such later years the United States can nonetheless be held liable to a tribal contractor despite the agency's inability to pay more is an issue that is the subject of litigation involving other tribes pending in the district courts. *But cf. Babbitt v. Oglala Sioux Tribal Pub. Safety Dep't*, 194 F.3d 1374, 1378 (Fed. Cir. 1999), cert. denied, 530 U.S. 1203 (2000) (rejecting similar claim against the BIA). Suffice it to say that, unlike the situation in *Babbitt* involving the Bureau of Indian Affairs' portion of the same appropriation, the current controversy involves Congress's decision *not* to "cap" the availability of IHS appropriations to pay contract support costs with "not to exceed" lan-

cannot today be compelled to reprogram any additional funds (whether leftover funds or funds devoted to "Federal functions") to pay its contract support cost obligations to tribal contractors. The caps thus foreclose the Secretary's parade of horribles.

Returning, then, to the case at bar, if IHS failed to meet its responsibilities to pay the Cherokee Nation in full seven, eight and nine years ago when an appropriations cap did *not* exist, the remedy today is an award of damages under the Contract Disputes Act, not the dismantling of IHS as the government carelessly suggests. (As for the government's speculation about a "liability of up to $100 million" arising out of two uncertified class actions in other circuits if the Federal Circuit is not reversed (Pet. 27), the fact is the government in *Cherokee I* has already defeated a motion for class certification (199 F.R.D. 357 (E.D. Okla. 2001)) (a ruling the petitioners therein did not appeal), and the Contract Disputes Act's six-year statute of limitation (41 U.S.C. § 605(a)) makes substantial additional claims today problematic, to say the least.)

Finally, the Federal Circuit's interpretation of § 450j-1(b)'s "reduction clause" in the context of that section's extensive anti-reduction prohibitions is true to the statutory text and hardly "'nonsense.'" Pet. 25 (citation omitted). It is not for the courts to question Congress's decision to force an agency, in clear and unmistakable terms enacted against a backdrop of years of agency misconduct, to prioritize and pay these contracts in full or suffer the consequences of reduced agency funding for its internal bureaucracy. The agency has only itself to blame for its absolute refusal to consider meeting its contract obligations to respondent, either by using a portion

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guage. As the Secretary acknowledges, Congress did not introduce such capping language into the IHS portion of the appropriations Acts until fiscal year 1998. Pet. 27.

of its annual appropriations increases before committing those increases elsewhere, using its leftover unspent funds, or reprogramming funds from its administrative activities—particularly when Congressional committees at the time repeatedly warned IHS to downsize those very operations in order to pay contractors in full. *E.g.*, H.R. Conf. Rep. No. 103-740, at 51 (1994) (demanding IHS reorganize and consolidate "to free up funding for additional self-governance compacts in [FY1995] and beyond"); S. Rep. No. 103-294, at 110 (1994) (demanding IHS restructure "if additional resources are to be made available to address other priority needs, such as self-governance compacts"); H.R. Rep. No. 103-158, at 100 (1993) (demanding IHS make "reductions . . . across all IHS administrative activities that are not related directly to the provision of health services").

So, too, the Federal Circuit's construction of Section 314 is hardly nonsensical (Pet. 23). As construed, Section 314 cuts off the Secretary's five year authority, otherwise available under 31 U.S.C. § 1553(a), to use his leftover expired appropriations to "liquidat[e] obligations properly chargeable to [each appropriations] account." That is certainly a far more sensible and comfortable construction of a 1998 rider than one which would rewrite an unambiguous 1993 appropriations Act to cut off vested contract rights.

CONCLUSION

For the foregoing reasons, respondent respectfully suggests that the Court consolidate the two pending petitions for briefing and argument. To avoid the waste of parallel double briefing, respondent further respectfully suggests that the Court direct petitioners in *Cherokee I* (the Shoshone-Paiute Tribes and the Cherokee Nation) and respondent here, all of which are represented by the same counsel, to file a joint opening brief, to which the Government would file a single response brief. The alternative of reviewing either case alone

runs the significant risk of hamstringing the Court's full consideration of the issues presented, particularly in light of the Secretary's dispositive concessions below.

Respectfully submitted,

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